UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAUL STRASTERS and ZADELLE STRASTERS, Plaintiffs, v. WEINSTEIN & RILEY, P.S. Defendant.	No. CV-10-3070-RHW **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Court held a bench trial in this case on January 30, 2012. The Plaintiffs were present and represented by Seth Reynolds. Jason Anderson appeared on behalf of the Defendant. The Court finds and rules as follows. FED. R. CIV. P. 52(a)(1).

FACTS

In 2006, the Plaintiffs filed for bankruptcy protection from their various creditors, including Wells Fargo Bank (Exh. 1). Weinstein & Riley ("Defendant") initiated an adversary proceeding on behalf of Wells Fargo—the parties eventually settled the claim for $3,000 (Exh. 2). Under this agreement, the Chapter 13 bankruptcy trustee would remit monthly payments to Wells Fargo until the bankruptcy proceedings converted to Chapter 7, and then the remainder would be paid directly by the Plaintiffs to the Defendant. The bankruptcy court issued an Order of Nondischargeability outlining these terms (Exh. A), and the trustee began making payments.

Despite this settlement and the trustee's payments flowing to Wells Fargo, the Defendant continued to contact the Plaintiffs regarding the debt. The Plaintiffs considered this a violation of the bankruptcy court's automatic stay and moved for sanctions (Exh. D). In return for the Plaintiffs withdrawing their motion, Lisa Shank, an agent for the Defendant, agreed to reduce $1,000 from Plaintiffs' balance. These two terms comprise the whole agreement. The Defendant never disputed that this oral agreement exists, and the Court discredits the testimony of William Weinstein that further conditions remain unfilled. By ceasing pursuit of their motion, the Plaintiffs substantially complied with the settlement agreement and are entitled to a $1,000 credit.

The trustee paid a total of $783.39 before the bankruptcy eventually converted into a Chapter 7 (Exh. B). The Plaintiffs then began making the $100 monthly payments to the Defendant as contemplated by the Order of Nondischargeability. They became confused, however, when their monthly statements failed to account for either the money paid by the trustee or the $1,000 settlement. The Plaintiffs wrote notations on the payment slips returned to the Defendant with each payment asking about these inconsistencies. This effort was fruitless. When the Defendant continued sending statements for the wrong amount, the Plaintiffs asked their lawyer, Robert Reynolds, to send the Defendant a letter about the errors. Mr. Reynolds had filed the Plaintiffs bankruptcy petition in 2006 and represented them throughout those proceedings, including the motion for sanctions. The Defendant's records show it received a letter in 2007 about payments to the trustee; the entry correctly surmised that the Defendant would "never see this" money (Exh. F, at 4). Mr. Reynolds sent another letter on November 19, 2008 (Exh. E), a document the Court finds genuine despite Mr. Weinstein's contrary assertions. But Mr. Reynold's labors fared no better than those of his clients, and the Defendant yet again failed to update the Plaintiffs' billing statements.

Over the next ten months the Plaintiffs paid $1,000 directly to the Defendant.

After subtracting this sum, the money paid by the trustee, and the settlement credit from the initial balance, the Plaintiffs owed $216.61. The Defendant eventually stopped sending the Plaintiffs monthly statements, and they never paid off this balance. Then, on July 30, 2010, the Defendant sent the Plaintiffs a demand letter for $2,000 (Exh. G). The letter does not detail how the Defendant arrived at this figure, but the Court finds the sum reflects only the Plaintiffs' direct payments, omitting the trustee's contributions and the $1,000 settlement negotiated by Lisa Shank. Finally exasperated, the Plaintiffs used the letter as the basis for this lawsuit.

These facts are assembled from the admitted exhibits and the testimony of both Plaintiffs, which the Court finds credible on all issues. The Court discredits the testimony of the defense's single witness, Mr. Weinstein, who was evasive and argumentative. Exemplifying his demeanor throughout the majority of his testimony, Mr. Weinstein indignantly refused to acknowledge that the letter to the Plaintiffs, which "demand[ed]" payment in "an attempt to collect a debt," was a debt-collection letter. In this exchange and others, Mr. Weinstein exhibited a clear bias against the "explosion" of FDCPA cases and the consumers who file them, and his testimony was inconsistent. He alleged more than once that the Plaintiffs falsified evidence, despite the parties stipulating before trial to the authenticity of every exhibit offered. Weighed against this hollow testimony, the Plaintiffs' factual proof exceeds the preponderance of the evidence burden with which they are saddled.

To meet its own burden on its affirmative defense, the Defendant relies almost exclusively on Mr. Weinstein. This creates an obvious problem. The documentary exhibits admitted to show the procedures the Defendant employs to avoid FDCPA violations speak for themselves, but Mr. Weinstein's testimony explaining those exhibits or procedures, the frequency of their use, and their overall effectiveness is not credible.

CONCLUSIONS

A. DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

At the close of the Plaintiffs' case-in-chief, the Defendant moved for judgment in its favor by arguing that the Plaintiffs failed to prove that it is a "debt collector" or that they are "consumers" under the FDCPA. 15 U.S.C. §§ 1692a(3) & (6); FED. R. CIV. P. 50. The Court denies this motion for two independent reasons.

First, the Plaintiffs moved for summary judgment on liability. Their brief alleged that the Defendant was a debt collector and attached the Defendant's interrogatory responses, which admitted that it possessed a contingent interest in recovery of Wells Fargo's debt and that it has sued other debtors in the past. (ECF No. 66, at 3). These facts, if true, would render the Defendant a "debt collector" under the FDCPA. Heintz v. Jenkins, 514 U.S. 291, 297 (1995) (holding that lawyers who attempt to collect third-party debts through litigation are "debt collectors"). Also attached was the Defendant's letter demanding that Paul Strasters pay the Wells Fargo debt. This evidence shows that Mr. Strasters is a "consumer," and, frankly, any argument to the contrary is frivolous. 15 U.S.C. § 1692a(3) (defining "consumer" as "any natural person obligated or allegedly obligated to pay any debt"). Upon these showings, the burden became the Defendant's to show that material factual issues precluded judgment.[1] Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Defendant's detailed response addressed every issue the Plaintiffs raised except these,[2]

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[1] After trial, the Defendant filed a supplemental brief arguing that the facts and argument offered in the Plaintiffs' summary judgment papers is insufficient to shift the burden. The Court finds this unpersuasive. The discovery responses set forth specific facts relevant to the Defendant's status under the FDCPA. Regardless of the weight the Defendant attributes to them, it was required to respond with controverting evidence establishing a factual dispute for trial. FED R. CIV. P. 56(c).

[2] Specifically, the Defendant responded to the Plaintiffs' arguments about the settlement agreement, the trustee's payments, the $1,000 credit, and its bona fide error defense.

and counsel failed to broach them at oral argument. Therefore the Court's order granting the Plaintiffs partial summary judgment subsumes these elements, and the Plaintiffs were not required to present such evidence at trial. Even so, the Plaintiffs presented sufficient evidence at trial to establish they were consumers under the FDCPA.

Second, the parties filed a joint pre-trial order, prepared by the Defendant, in which they identified six controverted legal and factual issues for the Court to resolve. (ECF No. 136). Pre-trial orders serve to focus the trial and prevent unfair surprise, United States v. First Nat'l Bank, 652 F.2d 882, 886 (9th Cir. 1981), the latter occurring, for example, when a party ambushes an opponent with a novel argument on the day of trial. Excluded from the pre-trial order's list of issues is any mention that the Defendant challenged its or the Plaintiffs' classifications under the FDCPA. The issue statements, as crafted by the parties, actually imply that the Plaintiffs have already satisfied these threshold showings. Moreover, after the Plaintiffs explicitly contended that the Defendant is a debt collector and they are consumers, the Defendant failed to address these issues in its own recitals. The Court deems waived any matters omitted from the pre-trial order and uses this as a second basis to deny the Defendant's motion. Miller v. Safeco Title Ins. Co., 758 F.2d 364, 369 (9th Cir. 1985) (holding that district courts retain broad discretion to determine the preclusive effect of a final pre-trial order on the determination of issues of law and fact at trial).

B. ISSUES PRESENTED AT TRIAL

1. The Settlement Agreement

The Defendant contends that a settlement agreement signed by Plaintiffs and Wells Fargo, a former defendant in this case, disposes of this lawsuit (Exh. 7). In a boilerplate clause, the agreement releases "Wells Fargo and its respective corporate parents, subsidiaries and affiliates, . . . and attorneys" from all claims relating to this action. It is signed by both Plaintiffs and a Wells Fargo representative; it is not signed

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(ECF No. 97, at 5-8).

by Defendant, nor is Defendant named anywhere in the document. The Court denied both of the Defendant's summary judgment motions on this issue, finding it reasonable to conclude that the "attorneys" released were those representing Wells Fargo in this lawsuit, not Defendant. It reserved a factual question for trial.

In Washington,[3] extrinsic evidence about the parties' intent is admissible to interpret ambiguous contracts. Berg v. Hudesman, 115 Wn.2d 657, 662 (1990). Relevant evidence includes that about: (1) the subject matter and objective of the contract; (2) all the circumstances surrounding the making of the contract; (3) the subsequent acts and conduct of the parties; and (4) the reasonableness of respective interpretations urged by the parties. Hearst Comm'n, Inc. v. Seattle Times Co., 154 Wn.2d 493, 502 (2005). But outside evidence is limited to determining the meaning of specific words and terms. Id. at 503. Here, the parties contest the definition of "attorneys."

The Court finds that the Defendant is not covered by the settlement agreement's release. Paul Strasters testified that he intended to release only Wells Fargo and not the Defendant. Several facts corroborate this testimony. First, the agreement does not name the Defendant as a party to it, despite specifically identifying this lawsuit, and although it does not define the term, it indicates that a different attorney represents Wells Fargo. Second, the Defendant was not included in the stipulation for dismissal of Wells Fargo, which it approved without objection. If the parties intended to release Defendant, this omission would be a violation of the settlement agreement requiring that "the Strasters shall dismiss, with prejudice, the Lawsuit." The Defendant never alleged such a breach because there was none. The agreement provides for the dismissal only of the claims "against Wells Fargo." Third, the Defendant participated in a settlement conference with Magistrate Judge Hutton three months after the

[3] The settlement agreement's choice of law provision names Washington law.

agreement purportedly ended the lawsuit.[4] This behavior is inconsistent with a belief that Plaintiffs and Defendant had settled the case. *See* Hearst, 154 Wn.2d at 502 (holding that a party's actions after execution of an ambiguous contract are relevant to its interpretation).

These facts compel the conclusion that the agreement means what at first seems obvious: The document signed only by Wells Fargo, one defendant in a two-defendant case, releases only Wells Fargo. The Court also finds that the agreement forgives the remaining $216.61 the Plaintiffs owed the bank.

2. FDCPA Violations

The Plaintiffs alleged two FDCPA violations in addition to the one the Court previously found for not crediting the trustee's payments.

a. Contacting the Plaintiffs directly while they were represented by counsel

Debt collectors who contact consumers directly with knowledge they are represented by counsel violate the FDCPA. 15 U.S.C. § 1692c(a)(2). The Defendant addressed the July 30, 2010, demand letter directly to the Plaintiffs; it sent a copy to Mr. Reynolds. Mr. Weinstein characterized the copy as a courtesy, maintaining that the Defendant believed Mr. Reynolds' representation ended upon the termination of the bankruptcy. The Court does not credit the testimony that the Defendant would copy an attorney on a debt-collection letter even if it believed that the attorney no longer represented the consumer. The Court finds that the Defendant had actual knowledge of Mr. Reynold's representation in 2010. Its conduct violated the FDCPA.

Moreover, constructive knowledge can establish a violation. *See* Goins v. JBC Assoc., P.C., 352 F. Supp. 2d 262, 273 (D. Conn. 2005) (finding that a lawsuit filed three years earlier by consumer against debt collector was sufficient notice of

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[4] At the trial, counsel characterized the Defendant as an unwilling attendee whose presence was ordered by the Court. But the record indicates that the Defendant *requested* a referral to the magistrate judge after execution of the settlement agreement. (ECF No. 32).

representation). Here, Mr. Reynolds represented the Plaintiffs in their bankruptcy proceedings from 2006 until 2008, filed and settled the motion for contempt, and sent the Defendant letters in 2007 and 2008 inquiring about the Plaintiffs' account. From these facts the Court finds that the Defendant should have known the Plaintiffs were represented with respect to this debt, irrespective of their actual knowledge.

b. Misrepresenting the account balance by not crediting the $1,000 settlement

Communications that misrepresent "the character, amount, or legal status" of a debt violate the FDCPA. 15 U.S.C. § 1692e(2)(A). In addition to not crediting the Plaintiffs for payments made by the trustee, the $2,000 demand letter did not reflect the $1,000 credit negotiated to settle the motion for contempt in the bankruptcy court. As discussed above, the Plaintiffs became entitled to this credit when they stopped pursuing their motion. The Defendant's failure to properly account for the trustee payments and the credit in the demand letter violates the FDCPA.

3. Bona Fide Error Defense

Notwithstanding these three prima facie violations, the FDCPA provides the Defendant a narrow exception to liability. Clark v. Capital Credit & Collec. Servs., Inc., 460 F.3d 1162, 1176-77 (9th Cir. 2006). Dubbed the "bona fide error defense," this affirmative defense applies only if the debt collector:

> shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

15 U.S.C. § 1692k(c). The Defendant must prove that (1) it violated the FDCPA unintentionally; (2) the violation resulted from a bona fide error; and (3) it maintained procedures reasonably adapted to avoid the violation. McCullough v. Johnson, Rodenburg & Lauinger, LLC, 637 F.3d 939, 948 (9th Cir. 2011). The first prong is subjective, the remaining two are objective, and the Defendant has the burden of proof on all three. Johnson v. Riddle, 443 F.3d 723, 728-29 (10th Cir. 2006).

Because the Defendant committed three FDCPA violations, it must separately prove each was the result of a bona fide error. It cannot do so. As the name of the

defense suggests the error must be bona fide, that is, one made in good faith. Kort v. Diversified Collection Serv., Inc., 394 F.3d 530, 538 (7th Cir. 2005). An individual who acts opposite his own actual or constructive knowledge does not do so in good faith. This basic tenet is interwoven into nearly every area of the law, and the Court finds it equally applicable to the bona fide error defense. *Cf.* In re Eastman, 419 B.R. 711, 730 (W.D. Tex. 2009) (applying principle to FDCPA).

The Defendant had knowledge about each of the three violations. It knew or had reason to know that the bankruptcy trustee would make direct payments to Wells Fargo; it was directly involved in negotiating the nondischargability order that provided as much. The Defendant's own case notes also reveal it received a letter from Mr. Reynolds "stating that this [debt] is going to be paid by the trustee." (Exh. F, at 4). As to the missing credit, the Plaintiffs credibly testified that they wrote to the Defendant several times asking why their balance did not reflect either the trustee's payments or the $1,000 credit. Mr. Reynolds sent another letter in 2008, reinforcing that the statements failed to apply the credit. And, as previously discussed, the Defendant demonstrated actual knowledge of Mr. Reynold's representation by copying him on the demand letter. These reasons are enough to reject the bona fide error defense on all three violations.

But to invoke the defense, the Defendant must also show that it maintains a procedure reasonably adapted to avoid each error. This circuit employs a two-step analysis. Reichert v. Nat'l Credit Sys., Inc., 531 F.3d 1002, 1006 (9th Cir. 2008). First, the debt collector must actually employ procedures to avoid errors. Reasonable policies that the Defendant normally uses, but for whatever reason overlooked in this case, do not support the defense. Second, the procedures used must be "'reasonably adapted' to 'avoid the *specific error at issue*.'" Id. (emphasis added). The Defendant presented no evidence of a procedure to prevent direct consumer contact, nor did it explain why the $1,000 settlement was not properly credited or the procedures that ordinarily would do so. The Defendant fails to carry its burden on those two

violations.

As to the remaining violation, Mr. Weinstein testified about “Blossom,” the Defendant’s internal case management program. He explained that the automated system culls information from a number of sources, including the federal courts’ PACER database, scanned postal mail, and—important here—creditors’ “direct pay files.” The direct pay file is an electronic document maintained by Wells Fargo that is supposed to account for any payments the bank receives from consumers. There is no evidence that the Defendant contacted Wells Fargo to ask if the trustee was making payments. This single “procedure,” deferring to Wells Fargo’s files, is not reasonable. McCullough, 637 F.3d at 948 (“Unwarranted reliance on a client is not procedure to avoid error.”). Here, the Defendant had several reasons to know that the bankruptcy trustee was making payments directly to the bank. A reasonable procedure would involve cross-referencing this information with the incoming direct pay files and flagging any inconsistencies. The Defendant “is not entitled under the FDCPA to sit back and wait until [Wells Fargo] makes a mistake” and shield itself with the bona fide error defense. Reichert, 531 F.3d at 1007 (concluding a debt collector did not qualify for the defense because, in part, its procedure wholly depended on the creditor’s past provision of accurate information). This is another reason to reject the defense.

C. Damages

Debt collectors who violate the FDCPA are liable for actual damages, statutory damages of up to $1,000, and reasonable attorney's fees. 15 U.S.C. § 1692k(a). Although the statute does not define “actual damages,” courts analogize to compensatory damages and find the term includes out of pocket expenses and emotional harm. Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (holding that “actual damages” includes emotional distress for FCRA violations); *see also* Riley v. Giguiere, 631 F. Supp. 2d 1295, 1315 (E.D. Cal. 2009) (noting similarities in language and purpose between FDCPA and FCRA statutes).

The Court dismissed the Plaintiffs' claim for the amount erroneously demanded but never paid. So the remedies remaining are emotional harm, statutory damages, and attorney's fees.

1. Emotional Harm

The parties argue about the proper elements of an emotional damages award under the FDCPA. Indeed, there is no circuit precedent and a split of district court authority on the issue. Some require plaintiffs to prove the equivalent of a state law outrage tort (which requires "severe emotional distress"), while others impose a lesser burden of establishing "significant harm." *Compare* Riley, 631 F. Supp. 2d at 1315 (finding that the FDCPA creates a federal standard), *with* Costa v. Nat'l Action Fin. Serv., 634 F. Supp. 2d 1069, 1078 (E.D. Cal. 2007) (finding state tort elements the lodestar). The Court need not select among these competing interpretations, because it finds that the Plaintiffs did not prove "significant harm" under the more lenient standard.

Significant harm, while less than severe, must still be more than "[f]leeting or trivial anxiety or distress." Dawson v. Wash. Mut. Bank, 390 F.3d 1139, 1149 (9th Cir. 2004). Mr. Strasters testified that he would become angry when the Defendant would contact him, that he withdrew from social functions, and that he lost sleep during the pendency of his dealings with it. Ms. Strasters testified that she was not affected by the Defendant's actions, and professed concern only for her husband. Though the Court does not marginalize the Plaintiffs' experiences, neither has endured "significant harm" under the law.

Moreover, the Plaintiffs are also required to show a nexus between the Defendant's actions and their emotional harm. Id. at 1149-50. Causation is important in all cases, but it can become muddled in FDCPA actions because debt-laden consumers are already in stressful situations and subject to collection from a variety of creditors. The Plaintiffs have not shown an adequate nexus here. Ms. Strasters testified that her husband reduced his social contacts after a health scare in 2001, and

became even more withdrawn when the couple moved to Colorado in 2008. These external events could be as much a part of Mr. Strasters's anxiety as the Defendant's actions. The Court declines to award damages for emotional distress.

2. Statutory Damages

Statutory damages are available regardless of whether the Plaintiffs suffer any actual harm. Baker v. G.C. Services Corp., 677 F.2d 775, 780 (9th Cir. 1982). A FDCPA violation establishes the Plaintiffs' eligibility for statutory damages; in ultimately setting the amount, the Court weighs: (1) the frequency and persistence of non-compliance; (2) the nature of such non-compliance; and (3) the extent to which the non-compliance was intentional. 15 U.S.C. § 1692k(b)(1). Considering these factors, the Court awards the Plaintiffs $1,000 in statutory damages, the maximum permitted. Nelson v. Equifax Info. Servs., LLC, 522 F. Supp. 2d 1222, 1238 (C.D. Cal. 2007) (finding that statutory damages are measured per lawsuit, not per violation). The Defendant, despite repeated attempts by the Plaintiffs to correct the problem, erroneously demanded money from them for nearly two years. Although the Plaintiffs' lawsuit is based on a single letter, that communication constitutes three separate FDCPA violations. Clark, 460 F.3d at 1178 (holding that "the fact that numerous violations of the FDCPA are predicated upon one set of circumstances should be considered and that it is best considered during the calculation of damages"). The amount of this award is particularly appropriate given that $1,000 is also the amount of the credit improperly withheld by the Defendant.

3. Attorney's Fees

The Court must award attorney's fees and costs to a prevailing plaintiff but retains discretion to fix the amount. 15 U.S.C. § 1692k(a)(3); Sanders v. Jackson, 209 F.3d 998, 1003 (7th Cir. 2000) (holding a fee award mandatory under the FDCPA). The Plaintiffs shall submit a cost bill and request for an award of attorney's fees. The Defendant may respond, and the Court will determine whether a hearing is necessary.

Accordingly, **IT IS HEREBY ORDERED**:

1. The District Court Executive shall enter **JUDGMENT FOR THE PLAINTIFFS** for $1,000 and reasonable attorney's fees and costs, in accordance with this Order and FED. R. CIV. P. 58.

2. The Defendant is **ENJOINED** from contacting the Plaintiffs about the underlying debt at issue in this case.

3. The Plaintiffs shall submit a cost bill and request for fees on or before February 17, 2012. The Defendant shall respond on or before March 2, 2012.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward copies to counsel.

DATED this 8th day of February, 2012.

s/Robert H. Whaley
ROBERT H. WHALEY
United States District Judge

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